SUPREME COURT, U.S.
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No. 94-0328

In The

Supreme Court of the United States

October Term, 1994

DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

CHARLES BLAND, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, by failing to seek post-trial relief in the district court under Rules 59 and 60 of the Federal Rules of Civil Procedure, waived the right to dispute factual findings by the district court based upon uncontroverted declarations in the record.

PARTIES TO THE PROCEEDING BELOW

The present petitioner is the Director, California Department of Corrections, who was one of the respondents-appellants in the Court of Appeals.

Respondent Charles Bland, Jr., was the petitioner-appellee in the Court of Appeals.

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STATEMENT OF THE CASE

Respondent Charles Bland, Jr. ("Bland") was convicted of attempted murder in the Los Angeles County Superior Court and sentenced to life plus seven years. He was represented at trial by Ronald Anderson, an attorney who was later disbarred based in part upon his dereliction towards Bland. Bland had moved to discharge Anderson prior to the trial on August 14, 1987. The motion was summarily denied by the trial court without inquiry into the substance of Bland's grievances. [Cert. Petn., App. B, Pages 6 through 8.][1]

Bland filed a direct appeal on the discharge issue and a state habeas petition alleging ineffective assistance of counsel. In support of the habeas petition, Bland submitted two declarations of himself and his father which described some of Anderson's derelictions. [Cert. Petn., App. C, Pages 31-37.] Those declarations were uncontroverted. Bland's direct appeal and habeas proceeding were consolidated for consideration by the California Court of Appeal. [Cert. Petn., App. D.] The Court of Appeal affirmed Bland's conviction, modified his sentence, and denied his habeas petition in an unpublished opinion. [Cert. Petn., App. C.]

Bland then sought review in the California Supreme Court. The petition for review incorporated the uncontroverted declarations of Bland and his father. That petition was denied.

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[1] The present certiorari petition is abbreviated "Cert. Petn." The appendix to the certiorari petition is abbreviated "App."

In a federal habeas petition, Bland renewed his claim that his Sixth Amendment right to discharge Anderson had been abridged. A magistrate judge, after conducting an evidentiary hearing on the issue of probable cause to arrest, issued a report and recommendation that Bland's petition be denied and the action dismissed. [Cert. Petn., App. F.]

United States District Judge David V. Kenyon rejected the magistrate's report and recommendation. In a 21-page order, Judge Kenyon recounted the history of the proceedings and concluded that Bland's right to discharge Anderson had indeed been abridged on August 14, 1987. In Footnote 8 of that order, Judge Kenyon stated that the facts contained in the two uncontroverted declarations would be assumed true to the extent they were not inconsistent with the balance of the record. [Cert. Petn., App. G, Page 6.]

Petitioner (respondent in the district court) did not seek an evidentiary hearing or other post-trial relief in the district court challenging the truth of the uncontroverted declarations.

The Ninth Circuit affirmed. [Cert. Petn., App. A, Page 3316.] In rejecting petitioner's claim that it had no "opportunity to refute" the uncontroverted declarations, the Ninth Circuit observed that:

> "The California Court of Appeal considered both declarations when it addressed Bland's ineffective assistance of counsel claim in the consolidated habeas proceeding, but nonetheless denied relief. Even though these facts are contained in the decision of Court of Appeal and were drawn directly from the declarations,

> the State did not dispute those factual allegations in the district court. Nor did it request an evidentiary hearing to resolve any disputes. To the extent the State had a dispute with the facts as stated in the decision of the Court of Appeal, it should have raised it in the district court. Accordingly, we find that the State waived this issue." [Cert. Petn., App. A, Page 3304.]

The Ninth Circuit also noted that petitioner did not assert that the declarations were untrue, only that petitioner had lacked an "opportunity to dispute" the declarations. [*Ibid.*, Page 3305.]

REASONS FOR DENYING THE WRIT

The decision below is correct. There is no conflict among the circuits; indeed, none is alleged. The Ninth Circuit's decision, furthermore, does not announce a new constitutional rule of criminal procedure under *Teague v. Lane*, 489 U.S. 288, 299 (1989). The Ninth Circuit correctly determined that petitioner simply waived a factual dispute in the district court. No substantial issue is presented.

I.

THE NINTH CIRCUIT CORRECTLY DETERMINED THAT PETITIONER WAIVED ANY DISPUTE WITH THE FACTS AS FOUND BY THE DISTRICT COURT BY FAILING TO SEEK AVAILABLE POST-TRIAL RELIEF IN THAT FORUM.

The crux of petitioner's claim is that petitioner was unfairly surprised by a factual finding of the district

court. The district court stated that it would assume the truth of two uncontroverted declarations submitted by Bland and his father in the state proceedings, to the extent those declarations were not inconsistent with the balance of the record. That factual finding was contained in Footnote 8 of the district court's order. [Cert. Petn., App. G, Page 6.] Petitioner now claims that it had no "opportunity to refute" the factual allegations contained in the those declarations.

A. Petitioner Failed To Seek Available Post-Trial Relief In The District Court.

If petitioner disagreed with any of the district court's factual findings, including findings based upon two uncontroverted declarations, petitioner should have sought post-trial relief in the district court under Rule 59 and Rule 60 of the Federal Rules of Civil Procedure.

Under Rule 59(a)(2), petitioner could have sought a new trial in the district court based on equity considerations. Any claim of unfair surprise would have been cognizable under that provision. Under Rule 59(e), furthermore, petitioner could have moved to alter or amend the district court judgment. The Rule 59(e) procedure is applicable to habeas corpus proceedings. *See Skagerberg v. State of Oklahoma*, 797 F.2d 881, 883 (10th Cir. 1986) (habeas petitioner's Rule 59(e) motion denied in the district court).

Post-trial relief was also available to petitioner under Rule 60 of the Federal Rules of Civil Procedure. Under Rule 60(b)(1), relief was available for alleged "surprise" due to any of the district court's factual findings. Under

Rule 60(b)(6), furthermore, relief was available to petitioner based upon any alleged irregularity in the district court's fact-finding procedures. *Cf. United States v. Kralmann*, 3 F.R.D. 473, 475 (D. Ky. 1943) (dictum that a party "surprised at the trial" is "amply protected" by Rules 59(a) and 60(b) of the Federal Rules of Civil Procedure).

Petitioner was armed with an arsenal of procedures to raise its point in the district court. Petitioner did not avail itself of those procedures. If petitioner disagreed with the factual content of the uncontroverted state declarations, assumed to be true by the district court, petitioner should have sought a post-trial evidentiary hearing in the district court. Petitioner's assertion in the Ninth Circuit that it had no "opportunity to refute those factual allegations" is erroneous as a matter of law. [Cert. Petn., App. A, Page 3303.] Petitioner had ample opportunity to refute the declarations, but it did not even attempt to do so. (To this day petitioner does not state what parts of the state declarations, if any, are factually incorrect.)

Post-trial relief under Rules 59 and 60 of the Federal Rules of Civil Procedure was available in this habeas proceeding. Rule 11 of the Rules Governing § 2254 Cases provides as follows:

> "The Federal Rules of Civil Procedure, to the extent they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules."

The advisory committee notes on Rule 11 provide in pertinent part as follows:

> "Rule 11 extends this approach to allow the court considering the petition to use any of the rules of civil procedure (unless inconsistent with these rules of habeas corpus) when in its discretion the court decides that they are appropriate under the circumstances of the particular case. The court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus. Rule 11 merely recognizes and affirms the discretionary power to use their judgment in promoting the ends of justice."

In this case, petitioner did not even ask for post-trial relief under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure. In its certiorari petition, petitioner argues that, "Again no rule governing habeas corpus litigation prior to this point imposed a duty upon a respondent to request an evidentiary hearing or risk a waiver of the disputed factual issue." [Cert. Petn., Page 16.] Although petitioner may not have been under a "duty" to seek available post-trial relief, petitioner acted at its peril in failing to request such relief. The Ninth Circuit correctly determined that "the State waived this issue." [Cert. Petn., App. A, Page 3304.]

B. The Ninth Circuit Decision Does Not Announce A "New Rule" Of Criminal Procedure.

It follows that the decision of the Ninth Circuit announced no "new constitutional rule of criminal procedure" under *Teague v. Lane*, 489 U.S. 288, 299 (1989). The Ninth Circuit's decision is based, instead, upon the "old rule" of waiver.

Petitioner's state habeas procedures do not need to be revamped. If this situation ever arises again, the state should seek available post-trial relief in the district court under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure. Those rules provide "ample protection" against any alleged mistake or surprise in the district court's fact-finding process.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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